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**IN THE
COURT OF APPEALS OF INDIANA**

GARY L. GARRETT,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 02A04-0608-CR-427
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Judge
Cause No. 02D04-0604-FC-93

MAY 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Garrett-Appellant Gary L. Garrett (“Garrett”) appeals from his sentence imposed after pleading guilty to one count of Class D felony theft, Ind. Code §35-43-4-2, and admitting to his status as an habitual offender, Ind. Code §35-50-2-8.

We affirm.

ISSUE

Garrett raises the following issue for our review: whether the trial court erred by imposing a sentence without making any findings regarding aggravating or mitigating circumstances.

FACTS AND PROCEDURAL HISTORY

On March 30, 2006, Allen County Police officers were called to the site of a home under construction. The officers discovered that individuals had entered the home and had taken two large cases of tools from the construction site and dropped them by a roadway. Garrett was interviewed by Allen County Police officers. After having been advised of his rights and waiving those rights, Garrett admitted to participating in a burglary and theft of tools.

The State charged Garrett with Class C felony Aiding Burglary, and added the habitual offender count against Garrett on June 5, 2006. On June 27, 2006, Garrett and the State entered into a plea agreement. The State filed an amended charge of Class D felony theft. Garrett pled guilty to the amended theft charge and admitted to his status as an habitual offender.

During Garrett's plea hearing, he admitted that on March 30, 2006, he and some others went to a home to remove tools belonging to Mr. Ruben Graber. Garrett admitted that he and another individual had planned to take the tools. Garrett also admitted that he had two prior unrelated felony convictions. Sentencing was left to the discretion of the trial court.

A Pre-Sentence Investigation Report was filed on July 14, 2006. The report revealed that Garrett had prior juvenile adjudications, and one adult misdemeanor conviction, in addition to seven adult felony convictions. Garrett had abused marijuana since he was nine years old. On July 26, 2006, the trial court sentenced Garrett to one and a half years executed on the theft count and enhanced that sentence by three years due to Garrett's status as an habitual offender.

DISCUSSION AND DECISION

Garrett argues that the trial court erred because the judge failed to find and weigh the aggravating and mitigating circumstances in his case. Garrett argues that the trial court should have considered Garrett's cooperation with law enforcement and his guilty plea as significant mitigating factors. Garrett also argues that the sentence is inappropriate considering the nature of the offense and the character of the defendant.

On April 25, 2005, the Indiana Legislature's amendment of sentencing statute Ind. Code §35-38-1-7.1(d) became effective. Ind. Code §35-38-1-7.1(b) provides that the trial court may consider mitigating circumstances. However, a court may impose any sentence that is authorized by statute and permissible under the Constitution of the State of Indiana, regardless of the presence or absence of aggravating circumstances or

mitigating circumstances. Ind. Code §35-38-1-7.1(d). Accordingly, a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances. *Fuller v. State*, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006). The trial court may impose any sentence within the sentencing range without regard to the presence or absence of such circumstances. *Id.* Because the new sentencing statute provides for a range with an advisory sentence rather than a fixed or presumptive sentence, a lawful sentence would be one that falls within the sentencing range for the particular offense. *Id. citing Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005).

Subject to certain legal parameters, sentencing determinations are generally committed to the trial court's discretion. *Frey v. State*, 841 N.E.2d 231, 234 (Ind. Ct. App. 2006). When a trial court finds aggravating or mitigating circumstances, it must make a statement of its reasons for selecting the sentence imposed. *Id.*; Ind. Code §35-38-1-3. The trial court need not set forth its reasons, however, when imposing the presumptive sentence. *Frey*, 841 N.E.2d at 234.

In the present case, Garrett received a one and a half year executed sentence for Class D felony, theft. Ind. Code §35-50-2-7 provides that the sentencing range for a Class D felony is between 6 months and three years, with the advisory sentence being one and a half years. Therefore, Garrett received the advisory sentence for theft. Garrett did not receive an illegal sentence because his sentence falls within the sentencing range for a Class D felony. Further, a panel of this court stated in *McMahon v. State*, 856 N.E.2d 743, 749 (Ind. Ct. App. 2006), that we presume that by keeping Ind. Code §35-38-1-3 in place, the legislature intended to require a sentencing statement anytime the trial court

imposes a sentence other than the advisory sentence under the new statutes. Here, the advisory sentence was imposed. Therefore, no statement was needed.

In addition, Garrett's habitual offender status is a status offense mandated by Ind. Code §35-50-2-8. Therefore, it is not a criminal offense. The trial court was not required to identify and balance any aggravating or mitigating circumstances in determining the habitual offender enhancement. *See Lewis v. State*, 800 N.E.2d 996, 999 (Ind. Ct. App. 2003). The habitual offender enhancement is within the trial court's discretion. *Id.*

Ind. Code §35-50-2-8(e) provides that the range for enhancing an underlying offense due to the offender's status as an habitual offender is not less than the advisory sentence for the underlying offense, nor more than 3 times the advisory sentence for the underlying offense. The enhancement shall not exceed thirty years. Ind. Code §35-50-2-8(e). In the present case, the trial court enhanced Garrett's sentence for the underlying felony by three years. Again, the advisory sentence for the Class D felony was one and one half years. Three times the advisory sentence would be four and one half years. Therefore, the trial court's enhancement of three years was within the range provided for by statute. The trial judge did not abuse his discretion. The enhancement was a lawful enhancement.

Garrett argues that his four-year sentence is inappropriate in light of the nature of the offense and the character of the offender. He asks this court to review his sentence pursuant to Ind. Appellate Rule 7(B).

The trial court heard argument from the State requesting imposition of the maximum sentence due to Garrett's extensive criminal history, that being one adult

misdemeanor conviction, and seven prior adult felony convictions. Defense counsel argued that the trial court should consider as mitigating circumstances that Garrett admitted his involvement in the incident to the police, and that he pled guilty. Defense counsel also argued that the recommendation in the pre-sentence investigation report was reasonable. That recommendation was for imposition of one and one half years for the theft conviction, and an enhancement of one and one half years for the habitual offender status. The trial court's sentence was one year more than the probation officer's recommendation, which defense counsel argued was reasonable. Given Garrett's criminal history, the nature of the offense, Garrett's guilty plea, Garrett's cooperation with law enforcement, and Garrett's habitual offender status, the sentence imposed, four years executed, is a reasonable one.

CONCLUSION

The trial court did not err by imposing the advisory sentence for Class D felony, theft. The trial court was not required to make a statement when imposing what was formerly known as a presumptive sentence. The trial court was not required to find aggravating and mitigating circumstances when determining an habitual offender enhancement because it is a status offense not a criminal offense. Finally, the sentence was appropriate given the nature of the offense and the character of the offender.

Affirmed.

BAKER, C.J., and VAIDIK, J., concur.